United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7215

UNITED STATES COURT OF APPEALS

For The Second Circuit

B

CIVIL APPEAL NO. 77-7215

P/S

JAY BLUM,

Plaintiff-Appellant

vs.

PROBATE COURT OF CHITTENDEN COUNTY, et al.,

Defendants-Appellees

Appeal From The United States District Court
For The District of Vermont

ANSWERING BRIEF OF DEFENDANTS-APPELLEES GOLDHABER

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I. THE DISTRICT COURT PROPERLY READ AND CONSTRUED PLAINTIFF'S PLEADINGS

The Plaintiff's Complaint including the amendments of June 22, 1976, and December 21, 1976, state no cause of action against Defendants Dale and Jeanne Goldhaber and dismissal against them should be affirmed.

Plaintiff argues generally that the Court failed to consider the amendment of December 21, 1976 (Plaintiff's Brief, p.5), and that the thrust of Plaintiff's Complaint was dramatically changed because after the December 21, 1976, amendment, the fact of notice in the Massachusetts termination proceeding was challenged.

Plaintiff fails to note that in Paragraphs 11, 14 and 15 of the original Complaint, which were restated verbatim in the June 22, 1976, amendment and were not changed or deleted by the December 21, 1976, amendment, the fact of notice in the Massachusetts proceeding, the fact of representation by counsel, and the fact of having the opportunity to be heard in Massachusetts are all admitted.

It is a basic rule that statements made in a complaint are not only true, see F.R.C.P.11, but also are conclusive judicial admissions, casting the pleader, Jarnvagsstyrelsen v. Dexter & Carpenter, 32 F.2d.195, 198 (2nd.Cir.,1929); Raulie v. United States, 400 F.2d.487,526 (10th.Cir., 1968); Giannone v. United States Steel Corp., 238 F.2d.544,547 (3rd.Cir., 1956); IX Wigmore on Evidence, Sect. 2588 (3rd.Ed.,1940); 31A CJS Evidence, Sect.301 at pp.772-773.

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The claims made by Plaintiff are not set out hypothetically, or in the alternative, and while inconsistency is permitted, see F.R.C.P. 8(e), pleading is subject both to F.R.C.P.11 and to the basic rule of judicial admissions.

In face of the judicial admissions in Paragraphs 11, 14 and 15 of the Complaint, Plaintiff cannot show that he did not receive notice and did not have an opportunity to be heard in the Massachusetts termination proceedings.

II. BOTH THE 1983 and 2241 CLAIMS WERE PROPERLY DISMISSED FOR LACK OF JURISDICTION

A. GOLDHABERS DID NOT DEPRIVE PLAINTIFF OF ANY RIGHT UNDER COLOR OF STATE LAW.

Defendants Dale and Jeanne Goldhaber are the adoptive parents of the child, Dan. There is no claim that they have in any way deprived Plaintiff of any right under the color of State law; and, therefore, Plaintiff's claim against them pursuant to 42 U.S.C.1983 must fail.

Plaintiff argues in his brief at pp.17-18 that the Goldhabers "who are admittedly private individuals, acted and assisted so directly the Defendants in carrying out the unlawful actions in question that there is a sufficient nexus between them" to satisfy the jurisdictional requirement of 1983.

Presumably the claim is that the Goldhabers are "willful participants in joint activity with the State or its agents", see United States v. Prue , 383 U.S.787; 16 L.ed.2d.267,272,86 S.Ct.1152 (1966);

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Fine v. City of New York, 529 F.2d.70 (2nd.Cir.,1975).

The distinction is clear: Goldhabers had no part of the Massachusetts aspects of Plaintiff's Complaint and are not alleged to have such part; Goldhabers had no part in whether or not Plaintiff was notified or participated in the Vermont aspects of Plaintiff's Complaint and under no law cited by Plaintiff were Defendants Goldhaber under legal obligation to give notice of any sort to Plaintiff; what Goldhabers did do was avail themselves of an opportunity offered by the State of Vermont to all persons who qualify, that is to submit themselves for acceptance by the State authorities and the Probate Court as prospective adoptive parents; this effort on the part of the Goldhabers is a legitimate exercise of a right, and not a joint activity with the State, see Aknin v. Phillips, 404 F.Supp.1150 (S.D.N.Y.,1975); aff'd.538 F.2d. 307 (2nd.Cir.,1976).

The Goldhabers as private individuals served no function "essentially and traditionally public", c.f. Evans v. Newton, 382 U.S.296,15Led 2d.373; Powe v. Miles, 407 F.2d.73,79-80 (2nd.Cir.,1968).

The dismissal of the claim under 42 U.S.C.1983 for failure to state a claim against Goldhabers should be affirmed.

B. THE HABEAS PETITION WAS PROPERLY DISMISSED FOR LACK OF JURISDICTION.

The habeas claim pursuant to 28 U.S.C.2241 was properly dismissed for lack of subject matter jurisdiction; 2241 jurisdiction depends upon a claim of "severe and immediate" illegal restraint by governmental authori-

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ties, Hensley v. Municipal Court, 411 U.S.345,93 S.Ct.1571, 36 L.ed.2d. 294,300 (1973); Donnelly v. Donnelly, 515 F.2d.129 (1st.Cir.,1975).

It is submitted that Plaintiff's Complaint with its amendments does not allege a severe or immediate detention by governmental authorities, but rather attempts to relitigate or appeal a child custody matter which was finally determined long ago, see Jemzura v. Belden, 281 F.Supp. 200 (N.D.N.Y.1968).

Plaintiff places great reliance upon Nguyen DaYen v. Kissenger, 528 F.2d.1194 (9th.Cir.,1975) and quotes broad language which appears to reject the limitation of 2241 jurisdiction to illegal governmental detention or restraint; however, that case holds that the children in question there were in fact in governmental custody and states particularly that while child custody conflicts do not generally trigger habeas jurisdiction, Nguyen supra p.1202, in this case the children were on parole status and hence in the custody of the Immigration and Naturalization Service of the United States Government, Nguyen supra p.1203 fn.16.

The Goldhabers are not a governmental entity or agents thereof; and on the face of the complaint with amendments, they cannot be said to be exercising a severe immediate illegal restraint upon the child; therefore, the dismissal of the 2241 claim against them should be affirmed.

III. DISMISSAL BELOW SHOULD BE AFFIRMED UNDER THE RULE OF ABSTENTION

Both of Plaintiff's claims involve child custody and are subject to the general rule of Federal Court abstention in such matters, see

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Phillips, Nizer, Benjamin, Krim and Ballou v. Rosenstiel, 490 F.2d.509, 516 (2nd.Cir.,1973); Magaziner v. Montemuro, 468 F.2d.783,787 (3rd.Cir., 1972); Armstrong v. Armstrong, 508 F.2d.348 (1st.Cir.,1974).

The Court in Phillips supra cites Magaziner supra with approval and states as follows:

> As the two latter cases suggest [Magaziner being one] there is particularly strong reason for abstention in cases which, though not within the exceptions for matters of probate and administration or matrimony and custody actions, are on the verge, since like those within the exception, they raise issues "in which the states have an especially strong interest and a well-developed competence for dealing with them", Phillips supra p.516. [See also Kamhi v. Cohen, 512 F.2d.1051 (2nd.Cir.1975).]

This rule of abstention is regularly applied to 1983 actions, see Anonymous v. Bar Assn. of Erie County, 515 F.2d.435,437 (2nd.Cir.,1975) as well as 2241 petitions, see Solomon v. Solomon, 516 F.2d.1018 (3rd.Cir., 1975).

Plaintiff relies upon Nguyen DaYen v. Kissenger, 528 F.2d.1194 (9th Cir.,1975) to overcome this general rule of abstention (see Appellant's Brief, p.10). However, that case specifically distinguishes its "unique" facts, Nguyen supra p.1196-1197, from the general rule of abstention, Magaziner supra, Nguyen supra p.1202-1203 f.n.15.

Plaintiff relies upon Alsager v. District Court of Polk County, Iowa, 518 F.2d.1160 (8th Cir.,1975) which case appears to hold that constitutional attacks upon state domestic relations law are exempted from the rule of abstention in Federal Court, Alsager p.1166; Plaintiff may argue that this distinction saves this case from the rule.

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However, no constitutional attack may be made against the Goldhabers and this argument has no force against them; more broadly, Plaintiff's Complaint with amendments challenges the Massachusetts standards upon which Plaintiff's rights were terminated. No Massachusetts entity has been served or in any way made party to this proceeding so that no such constitutional attacks as are seen in Alsager can be heard by the District Court for the District of Vermont.

Finally, there is some expression in the cases which indicates that abstention will not be applied if no alternative exists. Here, however, all of the parties to this proceeding are Vermont residents; if Plaintiff chooses he has every opportunity to bring a habeas petition in Vermont State Courts to challenge the legality and propriety of the custody of Dan; it is settled that habeas is an appropriate vehicle for such challenge in Vermont, see In Re Cooke, 114 VT 177, 41 A.2d.177 (1945) In Re Forslund, 123 VT 341,189 A.2d.537 (1963).

IV. DISMISSAL SHOULD BE AFFIRMED ON F.R.C.P.19 GROUNDS

Dismissal of both claims should be affirmed on the basis of F.R.C.P.19. It is a familiar rule that an appellate court will affirm on any ground apparent in the record.

Plaintiff has grounded his complaint on a violation of his constitutional rights in the Massachusetts procedure which resulted in the termination of Plaintiff's claimed parental rights to the child, Dan.

Defendants Goldhaber moved to dismiss on a number of grounds

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including the failure to name the Commonwealth of Massachusetts or some agency thereof as a party to this litigation (Transcript p.13), see F.R.C.P.19(a); Kamhi v. Cohen, 512 F.2d.1051 (2nd.Cir.,1975); Roos v. Texas Co., 23 F.2d.191 (2nd.Cir.,1927). Kamhi is a case involving an attempt by a Nevada husband to prevent seizure in New York of his "Keogh Plan" by his New York resident wife. The wife was not made a party and dismissal on Rule 19 grounds was affirmed.

As Judge Oakes pointed out, "Rule 19 today involves a balancing of interests--those of the parties and of the outsider, those of the public and of the court in serving that the litigation is both effective and expeditious," Kamhi supra p.1054, while applying the "equity and good conscience" test of 19(b).

In this matter, the main thrust of Plaintiff's constitutional claim is against the Commonwealth of Massachusetts, which is not a party and cannot be made a party to litigation in the United States District Court for the District of Vermont; to litigate an issue of constitutional dimension, to permit a challenge to the law or procedure of a sovereign state in a federal forum outside its borders, and at the same time require Defendants Goldhaber to shoulder the burdens of that litigation is unconscionable.

Further, there is a relation between Rule 19 and the rule of abstention in custody and matrimonial matters which is exposed in Kamhi supra p.1055, see also Phillips, Nizer supra p.516. Here we have a custody matter falling directly within the exceptions set out in Phillips,

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supra p. 516, and not merely on the "verge"; this is a custody matter. Plaintiff here claims custody of the child Dan as against Defendants Goldhaber who are the child's adoptive parents; Kamhi supra indicates that when the Court is faced with a Rule 19 motion to dismiss for failure to name a necessary or indispensible party, requiring the Court to apply the balancing test set forth above, and the case also presents strong reasons for abstention, such as the instant case, then Rule 19 dismissal must follow, Kamhi supra p.1055.

Since this is a custody matter; and in addition, the Commonwealth of Massachusetts is not a party to this litigation and any determination of the issues raised in Plaintiff's pleadings would greatly affect the Commonwealth and presumably thousands of its citizens, Kamhi supra would indicate that both the rule of abstention and Rule 19 should dictate affirmance of dismissal.

CONCLUSION

For the above reasons, Defendants Goldhaber respectfully urge this Court to affirm the dismissal of Plaintiff's complaint below.

DATED at Burlington, Vermont, this 23rd day of November, 1977.

DALE GOLDHABER and JEANNE GOLDHABER

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CERTIFICATE OF SERVICE

I, Richard C. Blum, attorney for Defendant-Appellee Goldhaber, hereby certify that I have forwarded two copies of Appellee's Brief to Plaintiff's attorney and to Defendants' attorneys, through the United States mail, postage prepaid on the 25th day of November, 1977, at the following addresses:

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